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Supreme Court of the United States

October Term, 1965

No. 998

CRISSIE KISER, JAMES C. KISER, JOHN HENRY EPLING, EDNA EPLING, DWIGHT FLYNT, AND LOCKIE FLYNT,

Petitioners,

v.

BREAKS INTERSTATE PARK COMMISSION,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioners, Crissie Kiser, James C. Kiser, John Henry Epling, Edna Epling, Dwight Flynt, and Lockie Flynt (hereinafter referred to as Petitioners), and each of them, pray that a writ of certiorari issue to the Supreme Court of Appeals of the Commonwealth of Virginia, to review a final judgment rendered by said Supreme Court of Appeals on the 24th day of November 1965 whereby it refused an appeal applied for by the petitioners to said court to review a final decree entered by the Circuit Court of Dickenson County in said Commonwealth on the 23rd

day of June 1965. A transcript of the record in said cause, including the proceedings and all matters therein in the Supreme Court of Appeals of Virginia and also in said Circuit court, is herewith furnished certified by the clerks of the appropriate courts as provided by Rule 21 of your Honors' Court.

OPINION BELOW

No opinion was rendered by either the Circuit Court of Dickenson County or the Supreme Court of Appeals of Virginia, except as contained in their respective decrees; so much of which as is pertinent is printed hereto Appendices A and B.

JURISDICTION

The decree of the Supreme Court of Appeals, the highest court of the Commonwealth in which a decision could be had refusing the appeal, was entered November 24, 1965 and was final. Va. Code 1950, Sec. 8-476.

The jurisdiction of this court is invoked under Title 28, Sec. 1257 (3), 2101 (d) U.S.C.

QUESTIONS PRESENTED

1.

Does a decree of a State Court confirming the report of Commissioners appointed to evaluate land taken in an eminent domain proceeding, which report is clearly against the prepondering weight of the evidence after a view taken by them, and after then being instructed by the court *that they were not bound by the weight of the evidence but should take into consideration what they saw upon their view to determine the market value of the land taken and fix the compensation therefor,* deprive the owners of their property without due process of law or deny them of the

equal protection of the law? Stating the proposition more tersely under the Fourteenth Amendment, can a state deny a land owner the benefit of his evidence of its value by instructing the Commissioners appointed in an eminent domain proceeding to fix the value of the land to be taken after a view and hearing evidence that they can disregard the evidence and fix the value upon their view of the property when the evidence the court admitted showed the land to be taken to be much more valuable than the Commissioners found? Is the opinion of Commissioners formed upon a view to be accepted rather than the testimony produced by the landowners?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State * * * shall deprive, any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

STATEMENT OF THE CASE

I. Procedural History of the Case

Pursuant to authority granted by the Congress of the United States on August 14, 1954 (67 Stat. 584, Public Law 275) as later amended by Act approved September 18, 1964 (78 Stat. 257), . . . the Commonwealths of Kentucky and Virginia by the authority of their several legislative bodies entered into a compact or agreement which was to be an instrumentality of both Commonwealths in which all acts thereunder were to be deemed governmental functions, to create a corporate body known as Breaks Interstate Park Commission, of such area and character as might be deter-

mined by the Commission. This park was to be located in Pike County, Kentucky and Buchanan and Dickenson Counties, Virginia, where Russell Fork of Big Sandy River flows from Virginia into Kentucky. By like authority this was carried into effect (Acts. Va. Assembly 1954, p. 36), and was amended so as to give said Corporation the power of eminent domain (Public L. 88-602), H.R. 11162 of Sept. 18, 1964) (Acts Va. 1964, Ch. 291) Michies Supp. Va. Code of 1950, edition Sec. 25-232.

Petitioners owned in fee the surface of three adjoining tracts of land which Breaks Interstate Park Commission desired, and acting under this authority, the Park Commission instituted a suit in the manner provided by law in the Circuit Court of Dickenson County, Virginia, the court of proper jurisdiction, to condemn these three tracts of land. Petitioners appeared and filed proper defenses, and on a hearing the court appointed Commissioners, who were sworn and viewed the lands, heard evidence; and at the conclusion of said evidence, the court gave the Commissioners eight instructions, among which was "Instruction No. F" as follows:

> "The court instructs the Commissioners that while the parties to this proceeding have the right to present evidence, oral or otherwise, and you should consider all the evidence, you are not bound by the opinion of experts or by the apparent weight of the evidence, but, taking into consideration what you saw upon your view of the land, you may determine the present market value of the land and fix compensation in the manner set forth in the other instructions of the Court."

Whereupon the Commissioners retired to a room (the accustomed jury room) and some time thereafter returned to the court room with a previously prepared report, except

the amount containing conclusionary findings as follows: Kiser Tract $2,700.00; Epling tract $2,260.00; and Flynt tract $1,375.00 (See Appendix C).

In accordance with the state practice, these defendants filed exceptions to this report which contained the following:

> "The court erred in the instructions given, especially: * * * Instruction 'F', which allowed the Commissioners to make the law governing their proceeding and the award to be made by themselves, and roam around as to what the law governing them was, as to the qualifications of an expert witness, the weight to be given opinion evidence, the best evidence of value, examples of such by way of illustration, and especially in allowing the commissioners to disregard the evidence which the court admitted, and to find an award from their own whims and preconceived opinions of what might be right, and to make a tribunal of themselves and an award thereon and thereby not founded on the evidence.
>
> "This instruction allows the taking of defendants' property without the due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States, in that it allowed this property to be taken at the mere uncontrolled whim of the commissioners, is without any rule or directive as to how they were to arrive at their conclusion or complying with any standards. It allowed them to make an award without conforming with any testimony or contrary to all testimony.
>
> "Further, this instruction allowed a conclusionary finding without stating any reason or fact upon which it was reached."

Upon a hearing on these exceptions, without any further evidence, the court overruled them and confirmed the report in all particulars and "doth hereby confirm unto the Breaks

Interstate Park Commission the entire interest of the above defendants to the surface of the following property" (description is not copied because immaterial) (See Appendix A of this Petition). Thereupon, the petitioners, in the time and manner prescribed by the law of the Commonwealth of Virginia, gave notice of an appeal from said decree to the Supreme Court of Appeals of Virginia with assignments of error, among which were:

> "4. The Court erred in the instructions given, especially:
>
> "Instruction 'F' which allowed the Commissioners to make the law governing them and their proceedings and the award to be made by themselves, and roam around and speculate as to what the law governing them was; especially what qualified a person as an expert witness, the weight to be given opinion evidence, the best evidence of values and examples of such by way of illustration; and especially in allowing the Commissioners to arbitrarily disregard evidence that the Court admitted, and make an award from their own whims and preconceived opinions of what might be right or advantageous to the public, and thus to make a tribunal of themselves and without any standard or rule to guide them make an award therein not founded on evidence.
>
> "5. The said Circuit Court erred in giving instruction 'F'; because it allows these defendants' property to be taken without the due process of law, and of the equal protection of the law guaranteed them by the Fourteenth Amendment of the Constitution of the United States, in that it allowed their property to be taken at the uncontrolled whim of the Commissioners, and without any rule or direction as to how they were to arrive at their conclusion or complying with any standards. It allowed them to make an award without conforming with any testimony or contrary to all testimony.

"6. Said Circuit Court erred in giving this instruction 'F' because it allowed a conclusionary finding without stating any reason or fact upon which it is based and thus deprives these defendants of their property without either the due process of law, or the equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

"7. The said Circuit Court erred in the manner it submitted the case to the Commissioners in that it allowed them to conclude an award which would be and was insufficient to constitute the due process of law required to take the defendants' vested property, guaranteed by the Constitution of the United States, especially the Fourteenth Amendment thereto; because it allows a conclusionary finding by the Commissioners who were allowed to make a law according to their own whims or notion without the supervision of the Court, or without indicating what facts it found, if any, upon which to base its award, or what path they took or standard they adopted to reach it."

All of these were urged in the argument to the said Court, but the Court refused the appeal (Appendix B to this petition).

II. Facts Material to Case

The Principal facts material are set forth under the preceding head. In the evidence the complainant introduced four witnesses, who testified that the property to be taken was the entirety of three separate tracts owned by Kiser, Epling and Flynt, respectively, bounded on the north by State Highway 80 about 2,300 feet, and that the Flynt tract was also bounded on the east by State Highway No. 609 for 550 feet, and that both highways were constructed with hard top, with asphalt binder and were heavily traveled. None of the Commission's witnesses was from the vicinity

and they went upon the lands only once. One said he took only a general view and noticed only a few trees, and the others gave their opinion of the value of the lands as a whole from $60.00, $105.00, and $100.00 to $125.00 per acre, as timberland and farm land. On the contrary, petitioners introduced nine witnesses who were either reared in the vicinity of the land, owned and sold real estate close by and were familiar with the prices for which property had been bought and sold, or had been in the vicinity trying to purchase land or lots for building purposes and they testified that the lands taken were adapted to such use. These witnesses valued the lands at from $900.00 to $1,600.00 per acre, with the timber valued at from $300.00 per acre to $4,000.00 for the whole. Six of these witnesses who had spent their lives in the vicinity testified that they had sold and paid such prices there for similar lands and that the demand was great. By actual estimate according to the Government's standards of estimating timber, there was over 100,000 feet of timber that could be cut into lumber with a good undergrowth.

Stages and Manner In Which Federal Question Was Raised

The federal question was first raised in the court of first instance by exceptions to the report of the commissioners, as copied above, before it was confirmed; and that court being without authority to hear any further evidence overruled the exceptions, *Gas Corp.* v. *Horner*, 200 Va. 824. It was raised in the Appellate Court in petitioners' notice of appeal as set out above and again in the petition and argument to that court, which subsequently refused the appeal as shown by Appendix B attached to this petition.

ARGUMENT

Reasons for Granting the Writ

The federal question was raised in ample time and in a proper way. *Chicago B & Q Ry.* v. *Chicago,* 166 U.S. 226, 41 L. Ed. 979. Hence, this court has jurisdiction.

Instruction F, copied above, given to the Commissioners just before they retired to consult upon their award is not just an isolated mistake but is the result of a settled course of decisions applied to all property owners in all eminent domain cases in the State courts of this Commonwealth. It presents a federal question of substance not heretofore, so far as we can find, applied in a way which does not accord with the decisions of your Honors' court. *U. S. Metz,* 376 U. S. 192, 11 L. Ed. (2d) 629. If followed, it makes the method of evaluating property by commissioners in eminent domain proceedings depend upon whether the proceedings are in a State or Federal Court, and gives a State the right to allow a procedure different from that applied by a federal court in condemning the same property, and thus denies a property owner of the equal protection of the law. If followed, it applies State procedure in a case in which Federal authority is paramount as this proceeding is by virtue of authority authorized by Congress, consenting to the compact between these two Commonwealths.

At the beginning of this century in an eminent domain case, the Virginia Supreme Court said:

> "The best that can be done is to appoint capable and upright commissioners to go upon the land, examine it, hear the testimony, and consider all the facts and circumstances surrounding the situation, and likely to enter into the value of the subject." *Richmond & C. Ry.* v. *Chamblin,* 100 Va. 401.

This view has been gradually expanded in this state until the court has, as in this case, established a rule that Commissioners may base their report on *their* view, whatever the evidence. We contend this deprives the owner of his property without due process of law and denies him the equal protection of the law; for in all other kinds of proceeding, the owner of the property is allowed to be confronted with the witness against him and introduce under the direction of the court the kind of evidence he can produce. The reason given by the Virginia court for this departure is that the commissioners:

> "May base their findings on facts obtained by their view of the property which does not appear in the record." *May* v. *Malcom,* 202 Va. 78, 82.
>
> "Commissioners * * * could give their own conclusions based upon their view of the land." *V.E.C. Co.* v. *Pickett,* 197 Va. 269, 276.

This puts every man's property in the Commonwealth at the whim, caprice, passion or prejudice of commissioners untrained in the procedure to be followed, without the direction of the court, to make such rules and consider anything their fancy might suggest, if the legislature will confer the power of eminent domain upon any person that desires the property.

> "If the defendant in a federal court were to be denied the opportunity to be confronted with the witnesses against him the denial of the privilege would not be overlooked." *Snyder* v. *Mass.,* 291 U.S. 97, 78 L. Ed. 674.
>
> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable." *Id.*

Errors Here Urged

Did the decree of the court in confirming the report made in conformity to instruction F given to the commissioners just before retiring to a room out of sight and hearing of all as follows:

> "You are not bound by the opinion of experts or by the apparent weight of the evidence but, taking into consideration what you saw upon your view of the land, you may determine the present market value of the land and fix compensation."

deprive petitioners of their property without due process of law, or deny them the equal protection of the law?

It has often been said by the Virginia courts with reference to a view *by a jury* it was to enable it to apply the testimony disclosed upon the trial, "but does not authorize them to base their verdict on such view, nor become silent witnesses to facts which were not testified to in court," *Kimball* v. *Friend,* 95 Va. 125.

> "A view is not intended to supply evidence, but only to explain or clarify it." *Noell* v. *Com.,* 130 Va. 600.

Similar rules should apply in proceedings to condemn property under the power of eminent domain as applied in other cases. In eminent domain proceedings, commissioners are substituted for a jury, and as a commission deals with corporeal things, a view is required. But whatever procedure is followed, equal protection of law demands that equal treatment must be given to all persons, with reference to security of their property. The Virginia Bill of Rights declares that all men are equal and have the inherent right to possess property, Va. Court, Art. 1, Sec. 1; and that in controversies

respecting property, trial by jury is preferable to any other and ought to be held sacred. *Id.* Sec. 11. At the time that was penned, the practice in condemnation proceedings was to call the triers of fact commissioners, and it has always been understood that they are equivalent to jury. The Fourteenth Amendment requires that their functions must be equivalent, and their powers and authority be the same. In *Snyder* v. *Mass., supra*, Mr. Justice Cardozo said:

> "A view is not a trial nor any part of a trial in the sense in which a trial was understood at common law."

We insist:

> "Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." *Willner* v. *Common Character & Fitness,* 373 U.S. 96, 10 L. Ed (2d) 224.
>
> "The proceeding is judicial in its character, and the party in interest is entitled to have an impartial tribunal and the usual rights and prvileges which attends investigation." Cooley's Const. Lim. (7th) 817. *Monongahela Nav. Co.* v. *U.S.,* 148 U.S. 312, 37 L. Ed. 463.
>
> "When governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditonally been associated with judicial process." *Hannah* v. *Larche,* 363 U.S. 420, 4 L. Ed. (2d) 1307.
>
> ". . . that it shall be conducted in some fair and just manner with the opportunity to the owner to present evidence as to its value, and to be heard thereon." *U.S.* v. *Jones,* 109 U.S. 513, 27 L. Ed. 1015.

"The determination is to be made in the light of all the facts affecting the market value that are shown by the evidence." *Olsen* v. *U.S.*, 292 U.S. 246, 78 L. Ed. 1236.

"A full hearing is one in which ample opportunity is afforded to all parties to make by evidence or argument a showing fairly adequate to establish the propriety, or impropriety from the standpoint of justice and law, of the step asked to be taken." *Akron C & Y Ry.* v. *U.S.*, 261 U.S. 184, 67 L. Ed. 602

"It was for the jury [commissioners in this case] to determine the facts, but it belonged to the Court to determine the legal principles by which they were to be governed in fixing the amount of compensation." *Chicago B & Q Ry* v. *Chicago*, 166 U.S. 226, 41 L. Ed. 976.

"A denial of a constitutional right demands judicial protection." *Reynolds* v. *Sims*, 377 U.S. 533, 12 L. Ed. (2d) 527.

"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard is not a judicial determination of his right, and is not entitled to respect in any other tribunal * * *. It is in fact a mere arbitrary edict clothed in the form of a judicial sentence * * *. Notice is only for the purpose of affording the party an opportunity to be heard * * *. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether." *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 916.

In *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. Ed. 215, the court struck out the defendant's answer and rendered judgment, and it was held the judgment was void. *Galpin* v. *Page*, 18 Wall. 350, 21 L. Ed. 959.

This Instruction Was An Attempt To Delegate Judicial Power

By this instruction the court attempted to delegate its power. This it cannot do.

> "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 1 Cranch, 137, 177, 2 L. Ed. 63, 73.

What evidence the commissioners were to receive and consider, what law they should apply and how they should arrive at the amount to be awarded were questions of law for the court which could not be delegated to any person or body. Courts have only the authority delegated by the law making power, and this authority it cannot delegate to any one else, much less to the body whose conduct they are by law created to direct. *Delegatus non potest delegare,* 2 Kents Comm. 633; *Warner* v. *Martin,* 11 How 209, 223, 13 L. Ed. 667, 672.

These petitioners had the right to have this special untrained tribunal which was to fix the value of their property being taken without their consent and against their will guided and supervised in their proceedings by rules provided by law.

> "A judge cannot delegate his authority to another." 3 Kents Com. 457.
>
> "Any change which transfers the power that belongs to a judge to a jury, or to any other person or body, is as plain a violation of the Constitution as one that would give the courts executive or legislative power." *Brown* v. *Buck,* 75 Mich. 274, 13 A.S.R. 438.
>
> "Those who are chosen by the people to sit as judges must themselves discharge all the judicial duties of their office. * * * The trust is a personal one, inalienably

invested in the person selected by the people and cannot be delegated." *State* v. *Noble,* 118 Ind. 350, 10 A.S.R. 143.

Even the legislature cannot confer upon a body, municipal or otherwise, power to affect one in his private rights without providing it with directions for the manner of procedure that will give the party to be affected notice and an opportunity to avoid injury or to protect his rights.

This instruction here under consideration allowed the commissioners to declare the legal principles by which they would be governed or whether they would follow any rule or principle; to declare by let or leave what law they should follow; what they should consider; what evidence was admissible; to disregard the evidence the court admitted however convincing; what qualified a person to give his opinion of values; find an award from their own whims or preconceived opinion as to the value of this recreation area and who should pay for it; and to thus constitute a tribunal of themselves and make an award not founded on any evidence and contrary to and against the undisputed evidence; and all this without any rule or direction as a guide of what they should do or how to do it. It gave the Commissioners a roving power to inquire into fields they should be forbidden to enter. This instruction allowed them to make a conclusionary award without stating upon what it was based, what suggested it, what road it followed to reach it, or whether it would give the equal treatment it allowed others standing in the same situation, and thus deprived the petitioners of their rights contrary to the Fourteenth Amendment. *U. S.* v. *Metz, supra.* The instruction allowed these commissioners to do all this, although the law requires that all persons have their rights to their property tried according to the evidence adduced.

"The concept of equal protection has traditionally been viewed as requiring the equal treatment of persons standing in the same relation." *Reynolds* v. *Sims,* 377 U.S. 533, 12 L. Ed. (2d) 529.

"Where otherwise valid legislation is sought to be applied in an unconstitutional manner we do not sustain its application." *Gibson* v. *Fla., Leg. Investigating Com.,* 372 U.S. 539, 9 L. Ed. (2d) 947.

"Though the court may possess jurisdiction of a cause, of the subject matter and the parties, it is still limited as to modes of procedure." *Windsor* v. *McVeigh, supra; Yick Mo* v. *Hopkins,* 118 U.S. 356, 30 L. Ed. 220.

"If the Legislature leaves to administrative officers the determination of what the law shall be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void." *People* v. *Belcastro,* 356 Ill. 144, 190 N.E. (2d) 301, 92 ALR 1223.

"It is a fundamental of our system of government that the rights of men are to be determined by the law itself, and not by let or leave of administrative officers or bureaus. It is the prerogative of the legislative branch of the government to determine and declare what the law shall be, and the legislative branch may not delegate this function to executive or administrative officers." *Thompson* v. *Smith,* 155 Va. 367.

"The legislature must declare the policy of the law and fix the legal principles which are to control in a given case." *Id.*

"A party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers." Cooley's Const. Lim. (7th) 589.

This is a case in which the court followed the usual procedure until the commissioners were ready to retire and consider the award they were to make. Then the court in effect told them they did not have to give any consideration to the evidence it had permitted the parties to introduce but could fix the compensation the owners should receive on what they saw, whether they saw all the probabilities to which the property was adapted or not, and thus take petitioners' property and transfer it to another without giving them the benefit of a hearing, and thus denied them the protection all other land owners are accorded. The procedure to take an owner's property must be uniform, consistent and non-discriminatory. *Cox* v. *La.*, 378 U.S. 329, 12 L. Ed. (2d) 587. This was a perfect device for allowing petitioners' property to be taken without due process and compelled them to donate what the public should pay for. It allowed their property to be taken not as the law accorded other property owners but according to the uncontrolled will of a set of commissioners to confer it to the public if they believed it was not worth much as a good recreation area or play ground. The Fourteenth Amendment was designed "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *U.S.*, 364 U.S. 40, 4 L. Ed. (2d) 1561. The law is a rule. Who can say that one set of commissioners, not governed by any rules, will apply the same standards that another has or will? Uniformity is required by the Fourteenth Amendment. It prevents officials from denying at whim, fancy or favor the same treatment accorded one person that is accorded another. It is the scale by which all men's property, from the humblest to the most exhalted, is weighed, the plumb by which all men's rights are adjusted. It is the level down to which the highest and haughty are brought, up to where the humblest

and meekest are raised. It knows no rank or station or prerogative. It coerces the state from denying the poorest, most forgotten and forlorn what it grants the grandest and most powerful. This Amendment means that no agency of the state-legislative, executive or judicial—no instrumentality of the state, and no person, officer or agent exerting the power of the state shall deny to any person the protection it affords another, and applies to every act that is enforced or administered by the state.

But if it is contended that this instruction given is only permissive and not directory, we reply in the language of our Supreme Court:

> "An instruction permitting an erroneous finding may be not less hurtful than one that requires it." *Wash* v. *Holland,* 166 Va. 45, 56.

Due process requires that the value of petitioners' property be determined on evidence. *Fay* v. *Noia,* 372 U.S. 391, 9 L. Ed. (2d) 837, 862.

> "Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene* v. *McElroy,* 360 U.S. 474, 496, 3 L. Ed. (2d) 1377.

CONCLUSION

For the reasons above set forth, petitioners, and each of them, pray that a writ of certiorari be granted by your Honors directed to the Supreme Court of Appeals of Virginia, as provided by the rules of your Honors' court to certify the record and proceeding in the cause of Breaks Interstate Park Commission against the petitioners as above

set forth, and that on a hearing on said writ the decrees of said Supreme Court of Appeals and the Circuit Court of Dickenson County be reversed and annulled. And your petitioners will ever pray, etc.

Respectfully submitted,

S. H. SUTHERLAND
Clintwood, Virginia
Counsel for Petitioners

APPENDIX

APPENDIX A

Final Order Confirming Commissioner's Report

This cause came on this day to be heard upon the report of the Commissioners duly filed on March 24, 1965; upon the defendants' exceptions thereto filed on April 3, 1965; upon all former proceedings had herein; and upon argument of counsel.

It appearing to the Court that the defendants' exceptions to the report of the Commissioners are not well taken, and that each and all of them should be overruled, the Court doth overrule said exceptions to said report, and it is ORDERED that said report be, and it hereby is, confirmed in all particulars. To this action of the Court the defendants, by counsel, duly excepted.

It appearing that the defendants, by their Answer and the Deeds filed as Exhibits, do not claim the ownership of the coal and the right to remove the same, and that the Breaks Interstate Park Commission is not condemning the coal, gas, oil, or other minerals, and the right to remove the same, but is only condemning the surface of the lands of the defendants; and it further appearing that the Commissioners ascertained the value of the surface of the land taken from Chrissie Kiser and James C. Kiser, her husband, at $2,700.00; and the value of the surface of the land taken from John Henry Eppling, his wife, at $2,260.00; and the value of the surface of the land taken from Dwight Flynt and Lockie Flynt, his wife, at $1,375.00; and that there was no damages to the residue of any of the above defendants, the Court doth hereby confirm unto the Breaks Interstate Park Commission the entire interest of the above defendants to the surface of the following property:

* * *

It is further ORDERED that the Breaks Interstate Park Commission pay to the Clerk of this Court $2,700.00 for the surface of the property owned by Crissie Kiser and James C. Kiser, her husband, and $2,260.00 for the surface of the property owned by John Henry Eppling and Edna Epling, his wife; and $1,375 for the surface of the property owned by Dwight Flynt and Lockie Flynt, his wife.

It is further ORDERED that all liens by taxes, judgments, deeds of trust, or otherwise, upon said property or estate or interest therein are hereby transferred to such funds; and that out of such funds the Clerk is directed to pay said liens according to their priorities; and that when all of said liens are fully released of record the Clerk shall distribute the balance of said funds, if any, among the persons entitled thereto.

It is further ORDERED that the necessary Court costs of this proceeding be taxed by the Clerk of this Court and paid by the Breaks Interstate Park Commission, said cost shall include $30.00 each to the following Commissioners:

Marcel Phillips, W. B. Trivett, O. T. Austin, Henry Sutherland, and Paris Mullins, and $5.00 each to G. C. Branham, R. F. Arrington, Paul B. Mullins, Bonsall Sykes, who were summoned and appeared, but did not serve herein.

The Court doth further ORDER the Clerk of this Court to properly record and index the papers and exhibits herein, as is by statute made and provided.

And nothing further remaining to be done in this cause the same is hereby stricken from the docket.

Enter this Order this 23 day of June, 1965.

/s/ R. J. BOYD
Judge

App. 3

SEEN:

GREEAR, BOWEN, MULLINS,
WINSTON, PIPPIN & STURGILL
The Law Building
Norton, Virginia

By /s/ LESLIE M. MULLINS
Counsel for Petitioner

SEEN & EXCEPTED TO:

/s/ S. H. SUTHERLAND
Clintwood, Virginia

/s/ A. M. PHIPPS
Clintwood, Virginia
Of Counsel for Defendants

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 24th day of November, 1965.

The petition of Crissie Kiser, James C. Kiser, John Henry Epling, Edna Epling, Dwight Flynt and Lockie Flynt for an appeal from a final order entered by the Circuit Court of Dickenson County on the 23rd day of June, 1965, in a certain proceeding then therein depending, wherein Breaks Interstate Park Commission was plaintiff and the petitioners were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that the said order is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the order of the said circuit court.

A Copy,
Testee:

/s/ H. G. TURNER
Clerk

APPENDIX C

Report of Commissioners

TO THE HONORABLE RAYMOND J. BOYD, JUDGE OF SAID COURT:

We the undersigned Commissioners, appointed by this Court on *March 10, 1965*, to fix the value of the land taken herein and the damages, if any, which may accrue to the residue beyond the enhancement in value, if any, to such residue, do hereby certify that on March *23*, 1965 we were duly sworn and went upon said land in the custody of the Sheriff of Dickenson County, Virginia, or one of his Deputies, to view the same as directed by the Order of this Court; said land being those parcels of property in Dickenson County, Virginia, described in the condemnation Petition herein filed and to which reference is hereby made.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property owned by Crissie Kiser and James C. Kiser, her husband, at *$2,700.00*.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property of John Henry Epling and Edna Epling, his wife at *$2,260.00*.

Upon a view of the property and upon such evidence as was before us, we did fix the value of the property of Dwight Flynt and Lockie Flynt, his wife, at *$1,375.00*.

Given under our hands this *24th* day of March, 1965.

Marcel Phillips
Henry B. Sutherland
O. T. Austin
W. B. Trivitt
Paris Mullins
Commissioners

NOTE: Italics in the above report handwriting. Balance in typewriter print.

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In the Supreme Court of the United States

October Term, 1965

No. 998

CRISSIE KISER, JAMES C. KISER,
JOHN HENRY EPLING, EDNA EPLING,
DWIGHT FLYNT, AND LOCKIE FLYNT,

PETITIONERS

V.

BREAKS INTERSTATE PARK COMMISSION,

DEFENDANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR DEFENDANT IN OPPOSITION

Robert T. Winston,
Norton, Virginia

Leslie M. Mullins,
Norton, Virginia

Counsel for defendant

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In the Supreme Court of the United States

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V.

BREAKS INTERSTATE PARK COMMISSION,

DEFENDANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Breaks Interstate Park Commission, in opposition to the Petition for a Writ of Certiorari filed herein, respectfully represents:

QUESTIONS PRESENTED

The respondent disagrees with the statement of the question presented. Respondent contends that the proper question involved was whether the procedure of the Circuit Court of Dickenson County, Virginia, which was ratified by the Supreme Court of Appeals of Virginia in refusing a Writ of Error, acted to deprieve the petitioners of their property in an eminent domain proceeding without due process of law.

STATEMENT OF THE CASE

I. Procedural History of the Case

Page references to the transcript of the trial proceedings are prefixed by the letter "T".

This proceeding arose out of a condemnation proceeding in the Circuit Court of Dickenson County, Virginia, by which Breaks Interstate Park Commission sought to condemn the surface to certain property belonging to the defendants. Breaks Interstate Park lies partially in the Commonwealth of Virginia and partially in the Commonwealth of Kentucky. The Congress of the United States, by Public Law 88-602, H. R. 11162, of September 18, 1964, authorized each Commonwealth to acquire property located within each Commonwealth by the right of eminent domain. The Legislature of the Commonwealth of Virginia by Virginia Code Section 25-232, as amended, and further statutes of Title 25 of the Code of Virginia, as amended, gave the Breaks Interstate Park Commission the right to condemn land or any interest or estate therein necessary for Breaks Interstate Park Commission to use in providing land adequate for the public purposes of the Breaks Interstate Park Commission. The Breaks Interstate Park Commission duly authorized the proceedings after attempting to negotiate with the owners as to the price thereof.

Three different parcels of land were sought to be condemned. The tract of James C. Kiser and Crissie Kiser of Grundy, Virginia, were described in Paragraph II of the Condemnation Petition, and the copy of their Deed was filed as "Exhibit A".

The second tract of land sought to be condemned was the tract of John Henry Epling and Edna Epling, his wife, which is described in Paragraph III of the Condemnation Petition and their deed was attached to the Petition as "Exhibit B".

The third tract of land sought to be condemned was the land of Dwight Flynt and Lockie Flynt, his wife, which is

described in Paragraph IV of the Petition and "Exhibit C" filed with the Petition.

A map showing a survey of the three parcels of land, the surface of which was sought to be condemned, was filed with the Petition and marked as "Exhibit D".

Due process on the petitioners was effected by personal service on the petitioners, Crissie Kiser and James C. Kiser, and by an Order of Publication as to the non-resident petitioners, John Henry Epling and Edna Epling, his wife, and Dwight Flynt and Lockie Flynt, his wife, and any unknown owners.

The petitioners all entered a general appearance by counsel and filed an Answer in the proceedings.

Petitioners' answer indicated they were not advised as to the Breaks Interstate Park Commission's authority to condemn their land and were not fully advised as to the description set out in Paragraphs II, III and IV of the Petition and called for strict proof. The petitioners further contended that the map furnished by Breaks Interstate Park Commission was not completely accurate. The petitioners then further denied that they had been offered a fair and reasonable price for the land. The petitioners' deeds filed as "Exhibits A, B, & C" with the Petition, all showed that the coal was excepted as to the three tracts of land owned by the petitioners and that it had been previously or heretofore sold and conveyed. The petitioners in their answer further said that they were the owners of the gas and oil on the lands and the Pittston Company was the owner of the coal so far as they had been advised.

The defendant, Breaks Interstate Park Commission, gave due notice to the petitioners that it was moving the Circuit Court for Dickenson County for the appointment of Commissioners. The Court entered an Order pursuant to said Notice appointing nine disinterested freeholders of Dickenson County, Virginia, to appear before the Court on March 23, 1965, at 9:30 A.M. to hear the proceeding.

The Breaks Interstate Park Commission, by its duly

constituted officers and attorneys, appeared on March 23, 1965, and all of the petitioners appeared in person or by counsel. Pursuant to the Virginia procedure, four of the Commissioners were stricken from the Commissioner list. The defendant, Breaks Interstate Park Commission, struck two of the Commissioners and the petitioners struck two of the Commissioners. The Clerk of the Court swore the Commissioners and all of the remaining five made oath before him that they would faithfully and impartially ascertain what would be the value of the land condemned. The Court then directed the remaining five Commissioners to view the land and to fix the value and interest therein to be taken. Then, the Commissioners were taken by the Sheriff to the premises for the view. They were accompanied by the Court, counsel for the petitioners and the defendant, and the parties. The Commissioners took the view and had the boundaries pointed out to them and went over the land in person. Then the parties and Commissioners returned with the Court from the view to the Courthouse and evidence was given on behalf of the Breaks Interstate Park Commission and the petitioners, which involved substantially all of the transcript of evidence filed in this case. (T. 3, Entire Transcript).

Prior to the view, counsel for the parties entered into a stipulation that the only question involved was the amount of compensation for petitioners' surface. For the record, counsel again stipulated, to save time, that the defendant had the right to bring the condemnation suit and it was just a question of how much. (T. 4). The Court directed counsel for the petitioners to supply the Minutes of the Breaks Interstate Park Commission upon request of counsel for the defendants. No request was ever made for the defendant for copies of the Minutes of the Breaks Interstate Park Commission.

After hearing evidence for the defendant, Breaks Interstate Park Commission, and for the petitioners, the Court instructed the Commissioners, **without any objections being taken by any of the parties to the instructions**, as follows:

Instruction A

The Court instructs the commissioners that it is the actual present value of the land with all its adaptations to general and special uses, and not its prospective or speculative or possible value based upon future expenditures and improvements, that is to be considered.

Instruction B

The Court instructs the Commissioners that when private property is taken under the exercise of the power of eminent domain that the law requires that just compensation be paid to the land owner. Just compensation means a fair and full equivalent for the loss sustained. It would be unjust to the Breaks Interstate Park Commission if it were required to pay more than the loss sustained by the property owners and it would be unjust to the property owners if they should receive less than their loss.

Instruction C

The Court instructs the jury that it is the duty of the Commissioner to ascertain the fair market value of the land to be taken.

The fair market value of the property is the price it will bring when offered for sale by one who desires, but is not obliged, to sell and is bought by one who desires, but is under no necessity to buy.

It is not a question of the value of the property to the Breaks Interstate Park Commission or to the owners. Nor can the value be increased or reduced by an unwillingness to sell it or because the Breaks Interstate Park Commission needs the particular property; nor because of the proposed construction by the Breaks Interstate Park Commission..

Instruction D

The Court instructs the Commissioners that it is not